Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1497

DONALD M. HEAVRIN - - - - Petitioner

VERSUS

KENTUCKY BAR ASSOCIATION - Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

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April 20, 1979.

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OPINION BELOW

The Opinion of the Supreme Court of Kentucky (Appendix to Petition, pp. 1-11) is reported in 573 S.W. 2d (Ky. 1978).

JURISDICTION

The jurisdiction requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the disciplinary proceedings of the Ken-

tucky Bar Association and the Supreme Court of Kentucky were conducted in such a way as to deny the petitioner procedural due process of law and equal protection of the law under the Fourteenth Amendment to the Constitution of the United States.

2. Whether the evidence supports the findings and judgment of the Supreme Court of Kentucky.

RULES INVOLVED

RULES OF SUPREME COURT OF KENTUCKY (SCR) CONCERNING PROCEDURES IN DISCIPLINARY CASES (Before January 1, 1978 Amendments)

3.130 ABA Code of Professional Responsibility Recognized as Authority.

The Court recognizes and accepts the principles embodied in the American Bar Association's Code of Professional Responsibility as a sound statement of the standard of Professional conduct required of members of the bar, and the Board may cause to be tried all charges brought under this code as well as charges for other unprofessional or unethical conduct calculated to bring the bench and bar into disrepute.

3.160 Initiation of Disciplinary Cases.

(a) Any complaint against an attorney for unprofessional conduct shall be filed with the Director who shall promptly notify the attorney by certified mail of the complaint and inform him that he has fifteen days to acknowledge receipt of the complaint or respond to the merits.

(b) Neither the Kentucky Bar Association nor any member thereof shall be liable to any member of the Bar nor to any other person charged or investigated by said Association or its officers for any damages incident to such investigation or any complaint, charge, prosecution, proceeding or trial.

3.190 Charges; Form; by Whom and Where Filed.

If the Tribunal determines, by a majority vote, that a charge should be filed, it shall prepare such charge stating the name and present, or last known, address of the attorney and facts alleged to constitute unprofessional conduct. The charge shall be signed by a member of the Tribunal and filed in the office of the Director.

3.300 Rights of Respondent Against Whom a Charge has been Filed.

The respondent against whom a charge has been filed shall have the right to be represented by counsel and entitled to a hearing before a Trial Committee. He shall have all the rights secured to a party by the Rules of Civil Procedure with respect to the introduction of evidence, the right to compel the attendance of witnesses; and the production of books, papers and documents or other writings except those contained in the investigative file of the association. He shall have the right to an oral argument or to file a brief before the Trial Committee. He shall be afforded a full opportunity to remain silent, to defend himself by the introduction of evidence and to cross-examine witnesses called against him. If the respondent be unable to employ counsel, the Chairman, upon written request in affidavit form, made within twenty days after service of the charges, shall appoint counsel for the respondent.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1:

. . . . Nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Kentucky Constitution, Section 116 (Enacted 1974, effective January 1, 1976):

. . . . The Supreme Court shall, by rule, govern admission to the bar and the discipline of members of the bar.

KENTUCKY REVISED STATUTES

30.170 Court rules governing practice of law and state Bar

(1) The Court of Appeals (now called Supreme Court of Kentucky) shall adopt and promulgate rules:

(a) Defining the practice of law;

(b) Prescribing a code of ethics governing the professional conduct of attorneys and the practice of law;

(c) Establishing practice and procedure for disciplining, suspending and disbarring attorneys;

(d) Organizing and governing a bar association of the attorneys of the state to act as an administrative agency of the Court of Appeals for the purpose of enforcing such rules as are adopted and promulgated by the court under this section; providing for the government of the state bar as a part of the judicial department of state government, and for such divisions thereof as the Court of Appeals determines; requiring all persons practicing law in this state to be members in good standing of the state bar; and fixing the form or its organization and operation;

(e) Fixing fees upon recommendation of the board of bar commissioners to be paid for the purpose of administering this section and the rules adopted and promulgated under it, and for the collection and disbursement of such fees.

(2) The rules of court adopted and promulgated under this section shall supersede all laws or part of law in conflict therewith, to the extent of the conflict.

(3) No rule adopted and promulgated under this section shall prevent a person not holding himself out as a practicing attorney from writing a deed, mortgage or will, or prevent a person from drawing any instrument to which he is a party.

(Repealed June 19, 1976)

21A.150 Powers of Kentucky Bar Association in disciplinary proceedings

As deemed necessary in the exercise of its power to discipline attorneys, as granted by section 116 of the Constitution, the Supreme Court may authorize the Kentucky Bar Association to conduct hearings, administer necessary oaths, take testimony under oath, compel the attendance of witnesses, and compel the production of records and other evidence.

(Effective June 19, 1976)

21A.160 Organization and control of state Bar vested in Supreme Court

The Supreme Court has power to provide for the organization, government and membership of the state Bar of Kentucky and to adopt rules and regulations to govern conduct and activity of the state Bar and its members.

(Effective June 19, 1976)

STATEMENT OF THE CASE

On or about August 14, 1973, an attorney filed a letter in the Office of the Director of the Kentucky Bar Association (respondent herein) raising allegations that Donald M. Heavrin (petitioner herein) had engaged in unethical and unprofessional conduct with respect to the extraordinary circumstances surrounding the cashing and distribution of the proceeds of a check in the amount of $105,000. The letter was supported by photostatic copies of three sworn affidavits of persons stating their true signatures did not appear on the

checks (forgeries were present). The Director mailed a confidential letter dated August 14, 1973, to petitioner by certified mail pursuant to SCR 3.160 formally notifying petitioner that a complaint was being made against him. The Director's letter of notice did not contain copies of the actual documents that had been filed with the Director. However, the letter of notification accurately and fully informed petitioner in detail of all the factual allegations of misconduct which were contained in the actual documents. *Only these factual allegations became allegations in a later disciplinary charge together with allegations contained in a later letter of notice dated June* 10, 1976.

By letter dated August 16, 1973, petitioner's counsel replied to the Director's letter of notice and formally requested that proceedings before the Kentucky Bar Association be held in abeyance pending the outcome of litigation in the Jefferson Circuit Court styled *Citizens Fidelity Bank and Trust Company v. Donald M. Heavrin, et al.*, Civil Action No. 174698. On September 5, 1973, the Inquiry Tribunal granted petitioner's request for a continuance.

The Jefferson Circuit Court entered a judgment on September 11, 1975, and petitioner's counsel promptly mailed a copy to respondent. One week later respondent was informed by petitioner's counsel that motions were going to be made to alter or set aside the judgment. Finally, on March 1, 1976, counsel for petitioner confirmed by letter a telephone conversation he had with the Office of the Director, wherein he stated that an agreed settlement order had been entered in the civil litigation and that respondent would probably return the present disciplinary case to the Louisville Bar Association's Committee on Professional Responsibility to investigate all matters pertaining to the propriety of petitioner's

conduct. Said committee filed its report with respondent on June 4, 1976, and a second letter of notice dated June 10, 1976 (Appendix to Response, p. A1-A2), was mailed to petitioner pursuant to SCR 3.160 which contained each and every factual allegation of professional misconduct against petitioner. The second letter of notice was sent for the purpose of placing petitioner on notice as required by SCR 3.160 of additional facts disclosed in the Louisville Bar Association's investigation which had not been known by respondent when the earlier letter of notice was sent on August 15, 1973. *Only these factual allegations became allegations in a later disciplinary charge together with those raised by the August* 15, 1973, *letter of notice.*

Petitioner filed a response to the complaint on June 24, 1976, and on September 27, 1976, the Inquiry Tribunal filed a charge consisting of seven separate counts alleging that petitioner had engaged in unprofessional and unethical conduct calculated to bring the bench and bar of Kentucky into disrepute. An answer to the charge was timely filed by petitioner on October 7, 1976. A trial committee was appointed and a hearing held on March 11 1977. *At no time during the hearing or subsequent proceedings were any factual allegations made by respondent that were not fully set forth in the two letters of notice described above.* During the course of this hearing, petitioner's claim that his right to due process had been violated was discussed and the trial committee requested that the parties furnish it with briefs on this procedural issue.

Respondent and petitioner subsequently filed briefs with the trial committee and petitioner moved the committee to dismiss the charge on the ground that he had been denied due process either because a complaint had never actually been filed with the Kentucky Bar Association or, in the alterna-

tive, if a complaint had actually been filed, respondent was not furnished with a copy. The trial committee, by a vote of 2 to 1, recommended to the Board of Governors that the charge be dismissed for failure by respondent to comply with SCR 3.160, thereby, violating petitioner's right under the federal and state constitutions to due process and equal protection. (Appendix to Response, pp A3-A6, dissenting opinion and Appendix to Petition, pp. 31-33). It is significant to note that the trial committee expressly acknowledged that respondent had in fact received a complaint *prior* to sending notice to petitioner by letter dated August 15, 1973. The dissent to the trial committee report clearly and correctly stated the Director was under no rule provision to furnish a copy of the actual complaint to petitioner.

On July 16, 1977, the Board of Governors entered an order referring the matter back to the trial committee for a decision on the merits and a second hearing was held before the committee on August 30, 1977. The trial committee filed its findings of fact on January 2, 1978, and recommended that the charge against petitioner be dismissed. On March 18, 1978, the Board of Governors, by a vote of 10 to 1, found petitioner guilty as charged of Counts IV through VII of the charge and recommended to the Supreme Court of Kentucky that petitioner be suspended from the practice of law for a period of two years. (Appendix to Response, p. A7-A8) The Board of Governors has filed an opinion in the record setting forth its findings of fact and recommendation.

On June 30, 1978, counsel for petitioner filed a notice for review and brief on behalf of petitioner. Respondent filed its brief in reply on July 31, 1978. On October 31, 1978, the Supreme Court of Kentucky rendered a per curiam opinion by five (5) justices adopting the decision of respondent's Board of Governors and suspending petitioner from the practice of law for two (2) years. The Chief Justice and an associate Justice dissented. A petition for rehearing was denied on January 3, 1979. The Supreme Court of Kentucky stayed the execution of the mandate to permit initiation of proceedings in this Court. This Court has further stayed the proceedings pending a ruling on the petition.

Respondent has, in detail, stated the procedural process through which petitioner's disciplinary case has proceeded to this point to show its compliance with Rule 3 of the Supreme Court of Kentucky in every respect.

Petitioner has stated in his statement of the case (Petition pp. 5-13) his view of facts leading to his suspension from the practice of law by the Supreme Court of Kentucky. While the present cause is not materially based on the conduct of petitioner's showing grave misconduct as a practicing lawyer, petitioner has argued in his petition "vague charges" and "the lack of standards"; therefore, it is necessary to call the Court's attention to the findings of the Board of Governors, Kentucky Bar Association adopted by the Supreme Court of Kentucky. (See Appendix to Petition, pp. 40-41). The factual findings of the Board of Governors as adopted by the Supreme Court of Kentucky, as fully set forth, are respectfully called to the Court's attention at this time. (See Appendix to Petition, pp. 2-7). Petitioner's view of the facts are not the findings of the Board of Governors and the Supreme Court of Kentucky.

ARGUMENT

The issues raised by the petitioner in his Petition for Writ of Certiorari concern the constitutionality of the procedures utilized by the Supreme Court of Kentucky in disciplining its officers.

Each issue raised by petitioner will be answered briefly after a short consideration of the general issues in the case.

I.

THE DECISION BELOW WAS BASED ON AN ADEQUATE AND INDEPENDENT NON-FEDERAL GROUND ..

The constitutional issues raised by petitioner in his petition for rehearing before the Supreme Court of Kentucky were whether or not the disciplinary proceedings by the Kentucky Bar Association and Supreme Court were conducted in such a way as to deny him rights of procedural due process and equal protection of the law under the Fourteenth Amendment of the United States Constitution. The Court in its per curiam opinion clearly based its decision on independent and substantial non-federal grounds.

Under the Rules of the Supreme Court of Kentucky and Kentucky case law, the findings of the trial committee and the Board of Governors were only advisory; and the court itself made an independent examination of the factual and legal issues involved and confirmed the Board's advisory findings. (Appendix to Petition pp. 1-11). The court itself was the only body which could impose any disciplinary action and there was no denial of procedural due process. All rules of the court were strictly followed at all stages of the proceeding.

The state court has clearly stated this position in *Kentucky Bar Association v. Stivers,* Ky., 475 S.W. 2d 900, cert. denied, 406 U.S. 968 (1972), stating, in part:

> "The report and recommendations of the trial committee are only advisory to the Board of Governors, as are the Board's recommendations to this court. RCA 3.400, 3.420 (now RCA 3.360, 3.370). This means, of course, that in the end this court must be judge of the factual issues and of the final action to be taken; The role of fact-finder is neither welcome nor comfortable to an appellate court, but obviously we have saddled it upon ourselves by our own rules for this type of proceeding." (p. 904)

> • • • •
>
> "But it must be recognized that its action is nothing more than advisory to this Court. So far as we are concerned, the Board proceeding is mainly a screening device by which the respondent may be finally acquitted but cannot be convicted."
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> • • • •
>
> "In a matter as serious as this, the advisory weight of the Board's action can be little more than hortatory, which means in simple English, that the members of this Court are going to exercise their own judgment anyway." (p. 904)

It is equally clear that the court did exercise its own judgment by the fact that it refused to follow the recommendations of the trial committee concerning recommended discipline. The majority of the Court further exercised its own judgment in specifically reviewing the testimony of Maureen Collie, a bank employee, as given in *Citizens Federal Bank and Trust Company v. Donald M. Heavrin,* Jefferson Circuit Court Civil Action No. 174698 (1975). The court stated it believed Ms. Collie. (Appendix to Petition pp. 2 and 6). In fact, the dissenting opinion by Chief Justice John Palmore states, "This is a very critical point to me because if I were convinced that Heavrin did lie to Ms. Collie, I probably would concur in the majority opinion." (Appendix to Petition p. 13). Its majority judgment concerning factual issues agreed with the recommendations of the Board.

The constitutional issues raised by petitioner were answered by the court through the interpretation of Kentucky law and the Rules of the Supreme Court of Kentucky. The Court clearly cited the notice provision of SCR 3.160 (Appendix to Petition, p. 1). Its factual findings are based on the entire record and it stated the provisions of the Code of Professional Responsibility adopted by it which were violated. (Appendix to Petition pp. 2-10; SCR 3.130). The court did

not need to elaborate further in its concise and clear opinion. There were no federal issues to be decided since the sole basis on which to determine the validity of the petitioner's constitutional arguments rested on the proper interpretation of Kentucky law and standards of conduct set by the Kentucky court.

The facts in this case clearly show petitioner to be dishonest and unfit to practice law. The public must be protected from such a practitioner.

The petitioner has requested this Court to grant a Petition for Writ of Certiorari, and yet a close examination of the issues involved and a careful reading of the opinion rendered by the Supreme Court of Kentucky clearly reveals that the results reached in this case by the Supreme Court of Kentucky were based upon a clear and careful analysis of Kentucky substantive law, the Rules of the Supreme Court of Kentucky and the record in the case as a whole. Certiorari certainly should not be granted merely to review the findings of fact made independently by the Supreme Court of Kentucky and the sound standards of conduct applied to those facts by the court.

II.

THE DISCIPLINARY PROCEEDINGS OF THE KENTUCKY BAR ASSOCIATION AND THE SUPREME COURT OF KENTUCKY DID NOT DENY PETITIONER PROCEDURAL DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Petitioner states on page 14 of his petition that *In re Ruffalo*, 390 U.S. 544, 551 (1968), holds that state disciplinary proceedings are "of quasi-criminal nature." The *Ruffalo* case dealt with a federal disbarment proceeding. This Court had before it the state proceeding but denied the Petition for Writ of Certiorari. *Ruffalo v. Mahoning County Bar Association,*

Ohio, 199 N.E. 2d 396, cert. denied, 379 U.S. 931 (1964). While this Court has never, to respondent's knowledge, held that a state disciplinary proceeding lacks due process protections, it is certainly clear this case raises no important constitutional issue warranting review by this Court in setting a precedent to grant review of unified state bar disciplinary procedures on a procedural due process argument.

Indeed, the United States Court of Appeals for the Sixth Circuit reviewed the precise issues petitioner raises under Rule 3 of the Supreme Court of Kentucky (formerly Court of Appeals of Kentucky) and rejected due process arguments stating:

> (3, 4) There are, as appellants assert, some unusual features in the Kentucky procedure. The State Bar Board of Governors' review of a complaint (Step 2) is entirely *in camera* excluding the respondents who had been complained against. And the recommendations of the Trial Committee (Step 1) and those of the Board of Governors (Step 2) are entirely advisory. Kentucky's highest court has interpreted its rule as reserving to itself final decision as to both guilt and penalty after its review of the record made before the Trial Committee and the recommendations of the Trial Committee and the Board of Governors. ***Kentucky State Bar Association v. Stivers***, 475 S.W. 2d 900 (Ky. Ct. App. 1972). Part 3 of the Rules of the Kentucky Court of Appeals provides a full hearing on written charges, with rights of confrontation and counsel before the Trial Committee. There is no allegation that those rights were not made available to appellants. The Court of Appeals decisions were based upon the full written record made before the Trial Committee and after full hearing before the Court of Appeals itself. The panel of this court which decided the *Taylor* case was, we feel, eminently correct in rejecting federal due process attacks upon K.R.S. § 30.170

(1975) and Part 3 of the Rules of the Kentucky Court of Appeals. *Getty v. Reed*, 547 F. 2d 771, CA 6 (1977).

It is significant to note Chief Justice Warren E. Burger's comments on nationwide disciplinary efforts:

> "It is now five years since a committee of the American Bar Association, chaired by my distinguished colleague, Mr. Justice Clark, reported in essence that although we lawyers profess to regulate and discipline ourselves, by and large discipline of professional misconduct of lawyers is virtually non-existent in most of the fifty States. The American Bar Association is undertaking some steps to implement the Clark report, and in the past year or more there are encouraging signs of more progress than in the previous 25 years. That program demands more impetus and the moral support of the law school community, and of course the support of judges." Remarks of Chief Justice Warren E. Burger, Convocation for the Dedication, J. Reuben Clark, III Law School, Brigham Young University, Provo, Utah, September 5, 1975.

A. There is no Denial of Due Process Where A Lawyer is Not Given Any Opportunity for a Hearing Before the Board of Governors.

Petitioner readily admits he had a full due process hearing before a three-man trial committee, the chairman of which was designated and commissioned by the Chief Justice of the Supreme Court of Kentucky to try the issues in the proceeding.

In order for the Court to review the excellent due process procedures incorporated into Rule 3 of the Supreme Court of Kentucky, it is necessary to start at the beginning of the disciplinary process. In petitioner's case, a complaint was filed and investigated. Matters of severe unprofessional conduct were disclosed. Notice was given of the complaint and a timely response was filed. The Inquiry Tribunal, appointed by

the Chief Justice of the Supreme Court of Kentucky, reviewed the complaint and response and determined that probable cause existed to conclude that petitioner had been engaged in unprofessional conduct; therefore, a charge was filed. Petitioner received notice of the charge and a copy of the charge and filed a timely answer thereto. A full due process hearing was held in a "de novo" climate. The advisory trial committee report, the charge, the answer, and transcript of proceedings before the trial committee with briefs by the parties were reviewed by the Board of Governors without the presence of counsel on either side.

The Board of Governors had three alternatives: dismiss the charge, issue a private reprimand, or recommend public discipline to the Supreme Court of Kentucky. If the first two alternatives had been exercised, the case would have terminated without any detriment to the petitioner and the Board's sole function as a "screening device" would have been utilized. The vital elements of the due process hearing were fresh before the Board of Governors. The Board proceeded to *recommend* to the Supreme Court of Kentucky discipline in the form of two year suspension period. At that point, a possible point of detriment to petitioner, the court's rules provide for a review by the Court. Petitioner at that point, again, had an opportunity to file a response and brief in support thereof. Petitioner exercised that right. After the adverse opinion of the Supreme Court of Kentucky was rendered, petitioner exercised his right to file a petition for rehearing. In short, Kentucky's disciplinary proceedings are carefully drafted to assure all possible due process to an attorney under charge. At all crucial points in the proceeding notice and an opportunity to be heard are provided on numerous occasions after absolute notice of the allegations being made. *Never once has petitioner alleged that he was tried on facts of which he had no notice in either of the two* (2) *letters*

of notice or the disciplinary charge.

It is respectfully submitted that case law involving administrative proceedings in the executive branch of government with the right of review by the judicial branch are not applicable to original actions in the judicial branch by the court of highest jurisdiction in a state seeking to discipline officers of the court through proceedings instituted by the court through an administrative arm of the court: its unified bar association. Due process of law must be accorded to an attorney. This had been done without any doubt by Rule 3 of the Supreme Court of Kentucky.

The disciplinary proceedings of the Supreme Court of Kentucky are not unlike disciplinary proceedings before the United States Supreme Court as provided in Rule 8. It appears that where factual issues are raised, the Court may appoint a committee to make an inquiry into the matter and submit a report and recommendation to the Court. Stern and Gressman, *Supreme Court Practice*, 5th Edition (1978) at page 932.

Respondent will answer specific matters raised by petitioner regarding proceedings before the Board of Governors. The Board of Governors serves as a "screening device." A charge can be dismissed by the Board, however, no public discipline can be ordered so there is *no final* action taken by the Board in that respect. It would serve no useful purpose to permit either respondent or petitioner or both to appear before the Board in any manner other than by the entire record including all evidence produced at the due process hearing. There is no "hearing" before the Board. The proceedings before the Board are a valid exercise of the statutory (KRS 30.170) and inherent power of the Supreme Court of Kentucky (Rule 3).

When the Board recommends public discipline, a lawyer is given access and notice of the entire disciplinary file before the Board and has the opportunity to respond to the Board's decision and file a brief in support thereof before the court decides his case. There is no disparity between the factual findings of the Board and the court in this case.

Had the "Board" step of the proceeding been eliminated, the case would have gone to the Supreme Court of Kentucky for determination of factual matters and the degree of discipline to be ordered. Certainly this Court will not entertain the issue of whether or not the case should have been dismissed or the degree of public discipline to be given by the state court. The tests of *Willner v. Committee on Character*, 373 U.S. 96, 105 (1963); *Johnson v. Avery*, 393 U.S. 483; *Spevak v. Klein*, 385 U.S. 511; *Schware v. Board of Bar Examiners*, 353 U.S. 232, and *Konigsberg v. State Bar of California*, 353 U.S. 252, are sustained by Kentucky disciplinary rules. Petitioner had notice, in fact, answered as fully as he could before the Inquiry Tribunal, the trial committee and the court before final discipline was ordered. He was also heard before the court on a petition for rehearing.

B. The Fact that the Kentucky Bar Association Did Not provide Petitioner With an Actual Copy of the Complaint Filed Against Him in Giving Him Notice of all Allegations of Fact in the Complaint and Did Not Specify in a Later Charge of Unethical and Unprofessional Conduct Specific Sections of the Code of Professional Responsibility Violated by the Conduct Described in the Charge, Petitioner's Fundamental Right to Due Process of Law and Equal Protection of the Law Was Not Violated.

Petitioner states that SCR 3.160 requires the Director of the Kentucky Bar Association to tender actual copies of the complaint to a disciplinary respondent. This rule under any common sense reading does not so provide. The rule states

that the Director shall promptly *notify* the respondent of the complaint. Both letters of notice described in detail facts that the Association considered to give rise to unethical and unprofessional conduct. (Appendix to Petition, pp. 41-43). By Court rule petitioner had no right to the bar association's investigative file. SCR 3.300.

Petitioner answered the letters of notice by filing detailed responses. The charge of unethical and unprofessional conduct contains no provisions not previously stated in the two (2) letters of notice. Petitioner answered the charge. No allegations or no amended charges outside of the two (2) letters of notice and the only original charge were ever made by respondent. Petitioner never alleges surprise or secret charges were alleged against him nor that he was taken by surprise during any of the disciplinary proceedings. Petitioners, as a matter of fact, had complete advanced notice of all complaints and charges pursued by the bar association and defended himself against the complaint and charges at every turn. Procedural due process has been given to petitioner.

Disciplinary cases in the Commonwealth of Kentucky are civil in nature under state law. The Supreme Court of Kentucky in this case clearly cited its opinions so holding. (Appendix to Petition, p. 10). The Court has stated its test applied on determining guilt:

> SCR 3.330 states that "the burden of proof shall rest on the association in disciplinary proceedings and the facts must be proven by a preponderance of evidence," however, the test should be "beyond a reasonable doubt" because Kentucky in effect applies a criminal standard. Kentucky disciplinary proceedings have always been civil by nature as a matter of sound state law. *Commonwealth ex rel. Buckingham v. Ward,* Ky., 267 Ky. 677 (1937). This Court has never reversed a state court disciplinary action because it was a civil proceeding. The issue is really moot in Kentucky since the Supreme Court of Kentucky has held that it is probable each justice applies the "beyond reasonable doubt test" anyway. ***Kentucky Bar Association v. Franklin,* 534 S.W. 2d 459 at 463 (1976).**

By virtue of SCR 3.130 the Supreme Court of Kentucky on November 11, 1969 became the first state to adopt the Code of Professional Conduct of the American Bar Association as a sound standard of conduct required of lawyers and that charges can be preferred where those standards are not met *and for other conduct calculated to bring the bench and bar of Kentucky into disrepute.* With respect to the latter phrase, the Supreme Court of Kentucky has stated that this standard is neither vague nor ambiguous as a matter of state law. *Nicholson v. Judicial Retirement and Removal Commission,* 562 S.W. 2d 306, Part I (Ky. 1978); Appendix to Petition, pp. 9, Fn. 7.

Being a civil action there is no requirement that the bar specified in the complaint or charge the specific rule of the Code of Professional Responsibility which have been violated by a disciplinary respondent under the facts stated in the charge. The rules of court do not require such a construction of a charge. During the course of the disciplinary proceeding the facts of the case were argued in briefs with specific Code provisions being argued. The decision of the Board of Governors and suspension opinion of the Supreme Court clearly cited the provisions of the Code and SCR 3.130 that had been violated by petitioner.

With respect to the cashing of the $105,000. check by petitioner, such conduct was in direct contravention of DR 1-102 (A) (4) providing:

(A) A lawyer shall not:

(4) Engage in conduct involving dishonesty

The Board's decision, as adopted by the Court, states, "No amount of check manipulating by the respondent as went on in this case can be justified under the circumstances which are evident when the entire facts are documented." (Appendix to Petition, p. 8).

When respondent borrowed money for his client Donoghoe from Norman Bodenbender, petitioner misrepresented the purpose of the loan as disclosed in his deposition in the *Citizens Case* at page 45 where petitioner stated:

> "Rather than telling Norman I was bailing out a lawyer that had gone bad, because I didn't feel like I should reveal the nature of my relationship with this man because I had learned it within the attorney-client privilege, I told him I was in a real estate deal and it would take about 30 days, and he scratched his head and said, 'Can you pay me 9 per cent interest' and I said, 'I'll be glad to' and he said, 'Okay, Come and get it.' "

The Court said this in its suspension opinion: "In lawyer's language this is a misrepresentation. In layman's language this is a lie." (Appendix to Petition, p. 4). The Code of Professional Responsibility provides that a lawyer shall not engage in conduct involving deceit or misrepresentation. DR 1-102.

Petitioner knowingly commingled the funds of his client Donoghoe with his own in violation of DR 9-102 (A) stating in part:

> DR 9-102 Preserving Identity of Funds and Property of Client.
>
> (A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank account maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein

> except as follows:
>
> (1) Funds reasonably sufficient to pay bank charges may be deposited therein.
>
> (2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

We know of no exception to the foregoing mandatory rule that permits a lawyer to commingle the funds of a client with the client's knowledge and consent. The rule states a lawyer "shall" and there are no exceptions.

The Board of Governors and the Court also found that petitioner violated Canon 9 of the Code of Professional Responsibility which provides that a lawyer shall avoid even the appearance of professional impropriety. The Court stated, "It is the view of the majority of the members of this court that Heavrin was more interested in protecting his interests than that of his client and that he knew at all times what he was doing." (Appendix to Petition, p. 10). Needless to say, petitioner's conduct brought the bench and bar of Kentucky into disrepute.

The aforesaid provisions of the Code of Professional Responsibility were known to petitioner, or should have been. The concepts of honesty and fair dealing are old concepts. SCR 3.130 demanded that he have this knowledge. The standards are clear and so are the facts in this case. The standards are objective and the penalty for violating the standards means public discipline. Petitioner is guilty of serious wrongdoing.

III.

THE DECISION BELOW IS CORRECT AND THERE ARE NO JUSTICIABLE REASONS FOR GRANTING THE WRIT

The Per Curiam Opinion of the majority of the Justices of the Supreme Court of Kentucky is based soundly on facts in the record of pleadings, briefs and evidence before it. The court and the Board of Governors supported by the court considered all defenses offered by petitioner and clearly stated so. The court found no mitigating circumstances in the record in its sound discretion. A fair reading of the entire record supports the entire opinion of the court. The opinion clearly cites the evidence it found in the record to support its findings. The court applied a clear standard to the facts and its grave effect on the image of the bench and bar.

This Court has made clear the strong state interest of state courts in disciplining its members in the recent case of *Goldfarb v. Virginia State Bar, et al.*, 95 S. Ct. 2004 (1975) at p. 2016 when it stated:

> "We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety and other valid interests, they have broad power to establish standards for licensing practitioners and regulating the practice of professions. We also recognize that in some instances the State may decide that 'forms of competition usual in the business world may be demoralizing to the ethical standards of a profession.' United States v. Oregon State Medical Society, 343 U.S. 326, 336, 72 S. Ct. 690, 697, 96 L.Ed. 978 (1952), see also Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608, 611-613, 55 S. Ct. 570, 571-572, 79 L.Ed. 1086 (1935). The interest of the States in reg ulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts'. See Sperry v. Florida, 373 U.S. 379, 383, 83

> S. Ct. 1322, 1325, 10 L.Ed. 2d 428 (1963); Cohen v. Hurley, 366 U.S. 117, 123-124, 81 S. Ct. 954, 958, 6 L.Ed. 2d 156 (1962); Law Students Research Council v. Wadmand, 401 U.S. 154, 157, 91 S. Ct. 720, 723, 27 L.Ed. 2d 749 (1971). In holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act, we intend no diminution of the authority of the State to regulate its professions."

Petitioner seeks to relitigate his case on factual issues before this Court. If the Supreme Court of Kentucky gave little significance to the petitioner's evidence, it was due to the lack of credibility of evidence and not due to an oversight on the part of the court. Here again, petitioner has urged as a reason for granting Certiorari an issue which is not valid. The factual determination by the lower court and the weight and credibility accorded to the evidence are not properly reviewable especially where the court, directly in its opinion, reviewed the evidence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for Writ of Certiorari be denied.

Respectfully submitted

LESLIE G. WHITMER
Director-Counsel
Kentucky Bar Association
403 Wapping Street
Frankfort, Kentucky 40601
Counsel for Respondent

APPENDIX

KENTUCKY BAR ASSOCIATION

June 10, 1976

CONFIDENTIAL

Donald M. Heavrin, Esquire
914 Republic Building
Louisville, Kentucky 40209

Dear Mr. Heavrin:

An investigation by authority of this office has caused the following allegations to be made by this office, and you should regard them as a formal complaint issued against you.

In 1972 and thereafter, you represented James F. Donoghoe, Jr., in regard to various matters including a criminal charge in Jefferson County Court of uttering a worthless instrument for $3,000, and in negotiations with two of Mr. Donoghoe's clients from Pennsylvania who were making certain demands in regard to settlement money in a civil action. In order to assist your client, you loaned Mr. Donoghoe certain funds to partially or fully pay monies owed to Donoghoe's clients. In order to make such a loan, you misrepresented to Norman Bodenbender of Trustcon, Inc., Greenville, Indiana, that you desired to borrow some $45,000 for a real estate deal on a short term basis. Mr. Bodenberger subsequently loaned you $32,500. In order to secure yourself in your subsequent loan to Mr. Donoghoe, you accepted a bill of sale from Mr. Donoghoe for jewelry valued between $100,000 to $200,000 wherein Mr. Donoghoe agreed to sell the jewelry to you for $44,000 with an option to repurchase in 30 days. With the $32,500 loan you paid $10,000 to Fidelity Finance Corporation to pay off a loan owed by Mr. Donoghoe and thereby released the said jewelry which was being held as collateral. The remainder of the loan was then used to try and placate Mr. Donoghoe's clients and keep them from filing complaints with the Kentucky Bar Association and proceeding with prosecution against Mr. Donoghoe. As more funds were needed, you borrowed an additional $10,000 from your father.

In June of 1972, Mr. Donoghoe settled a personal injury action and received a check dated June 6, 1972, for $105,000 from Lord, Bissell, & Brock of Chicago, Illinois. After unsuccessfully trying to assist Mr. Donoghoe in cashing the said check at Liberty National Bank, you thereafter falsely told Mrs. Maureen Collie, an employee of Citizens Fidelity Bank & Trust Company, that you personally knew the said check had been endorsed by each listed payee.

At another point during your representation of Mr. Donoghoe, he tendered to you a check in the amount of $36,000 as a partial payment on the $42,500 borrowed by you for him. After you deposited the check, you were informed by Mr. Donoghoe that he had insufficient funds to cover it. Thereupon, you issued a check to Mr. Donoghoe for $36,000 in order to disguise your client's conduct and while you were cognizant of insufficient funds in your own bank account to cover your check. Both checks were returned for insufficient funds.

Pursuant to the provisions of RAP (formerly RCA) 3.160, you have fifteen (15) days from the date of this letter to respond to the complaint. This matter will be treated in accordance wih RAP 3.170 et sequi.

You should make no contacts or communications with the Inquiry Tribunal, House of Delegates, Board of Governors, Supreme Court of Kentucky, or any member thereof. Please observe the provisions of RAP 3.150 and 3.290 with respect to the foregoing communications or contacts.

Please file your response in triplicate within the stated time to expedite the necessary procedures. If you have any questions concerning the matter, please contact us.

Sincerely,
Leslie G. Whitmer
Director

LGW/sp
Enclosure
CERTIFIED MAIL

SUPREME COURT OF KENTUCKY

KENTUCKY BAR ASSOCIATION - Complainant

VS. **TRIAL COMMITTEE DISSENTING OPINION**

DONALD M. HEAVRIN - - Respondent

The majority of the trial committee has recommended to the Board of Governors that the respondent's motion to dismiss be granted. Respondent's position and apparently that of the majority is that his right to due process has been violated and therefore all charges should be dismissed, evidently with prejudice. For the reasons set forth hereafter, I respectfully dissent from that opinion.

The heart of the controversy is centered in RAP 3.160, in particular paragraph (a) which states:

> "Any complaint against an attorney for unprofessional conduct shall be filed with the director who shall promptly notify the attorney by certified mail of the complaint and inform him that he has fifteen days to acknowledge receipt of the complaint or respond to the merits."

Neither the respondent nor the trial committee assert the rule is in itself violative of due process. They do assert that the Bar failed to follow the rule, or at least their intrepretation of the rule, and in so doing failed to give the respondent his due process rights.

All the rule requires is that the respondent be notified of the complaint and given notice that he has 15 days in which to respond. It does not require the actual complaint, complete

with the names of all sources of information be forwarded. Would the majority hold that if the original information had been received by telephone, respondent must be given a tape of that conversation or at least a transcript thereof? I think not. Would the majority interpret the rule as requiring the Bar to abstain from investigating unethical conduct until a signed, written complaint has been filed? I hope not. To require this reads more into the rule than is there or was intended to be there, yet, that is precisely their position. Admittedly the rule, as with most writing efforts of man, could be more succinct, but at present it is sufficiently clear to refute the position taken by the respondent and adopted by the majority.

"Due process of law" means that no citizen shall be deprived of his life, liberty or property without reasonable notice and opportunity to be heard according to regular and established rules of procedure. The fundamental requirement is the opportunity to be heard. It is obvious that respondent was given this opportunity. It is also obvious that he was given adequate notice.

There is no claim that the Commonwealth's Attorney is or was a witness to the events which constitute the basis for the charges. Of course had he been, then there would have been the right to confront him *at the trial committee hearing.*

It is only where the name of the complainant is necessary for an adequate response to the merits that due process would require the name to be divulged. That is not the case here.

A few final comments regarding procedure. The trial committee unanimously requested the parties to brief the issue discussed above. We perhaps exceeded our authority in so doing since RAP 3.280 seemingly restricts preliminary motions. Nevertheless, the committee did so in order to give the

respondent ample opportunity to present every issue he felt important to his defense. I do disagree, however, in that by deciding the preliminary motion the trial committee is relieved from complying with RAP 3.360. The committee should have made the determinations required by the rule and presented its advisory report on the substantive issues as well as the preliminary motion. I do not, however, think that one member of the committee can or should file a report on the substantive issues, therefore this dissenting opinion does not express my position on the substantive issues.

MINORITY FINDINGS

It is the findings of the minority that:

1. (a) The complaint involved resulted from the investigation of the Bar; and

(b) Did not result from the information received from the Commonwealth's Attorney.

2. RAP 3.160 requires:

(a) Notice that a complaint has been made; and

(b) The opportunity for a response.

3. RAP 3.160 does not require:

(a) An absence of action on the Bar's behalf until a signed, written complaint is received;

(b) A copy of the "complaint" be given respondent.

4. The procedure used in the instant case comported with RAP 3.160 and did not deny due process of law to the respondent.

5. While the trial committee may hear evidence or matters raised by motions to dismiss, it has no authority to treat as dispositive, its recommendation on preliminary motions other than those set out in RAP 3.280.

6. The trial committee failed to comply with RAP 3.360 by not filing a report dealing with the substantive issues.

RECOMMENDATAIONS

1. That the majority opinion not be accepted.

2. That the trial committee be directed to file a report in compliance with RAP 3.360. That report may still include a recommendation to dismiss for procedural defects.

Victor Fox

MINUTES AND CERTIFICATION OF PROCEEDING BY BOARD OF GOVERNORS KENTUCKY BAR ASSOCIATION

IN RE: DONALD HEAVRIN

I, Frank E. Haddad, Jr., President, do certify:

This cause came on for consideration by the Board of Governors of the Kentucky Bar Association, 11 members entitled to vote on disciplinary matters being present, and all other persons and staff absent from the room. Richard D.D Remmers, Louisville, having disqualified himself in participating in this matter, and being absent from the room, pursuant to SCR 3.370 Chief Justice John S. Palmore appointed Robert G. Stallings, Louisville, as a special Board member to consider and act in this case.

The record of the case was physically present. On motion made and seconded, the report of the Trial Committee was received. The case was discussed, the discussion being confined to the record.

After full consideration, a roll call vote was taken on the issue of guilt or innocence. The result:

Guilty—10

Not Guilty—1

Abstaining—0

After discussion was held on the appropriate punishment, a roll call vote was held with a majority of 10 recommending to the Supreme Court of Kentucky that the respondent be suspended for two years and required to pay the costs

in this action.

Other recommended punishment was one for a private reprimand.

Pursuant to SCR 3.370, a written decision of the Board was ordered to be filed with the Director.

This certificate and minutes of proceeding, after being inspected by each member voting, are made a part of the record in this case and the minutes of the Association.

This 18th day of March, 1978.

FRANK E. HADDAD, JR., President

ATTEST:

LESLIE G. WHITMER, Director

CERTIFICATE OF SERVICE

I, Leslie G. Whitmer, Counsel for the Kentucky Bar Association, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 20th day of April, 1979, I served on the Honorable Henry A. Triplett, Third Floor, 231 South Fifth Street, Louisville, Kentucky 40202, Attorney for Petitioner, a copy of this brief by mailing same, postage prepaid.

Leslie G. Whitmer

LESLIE G. WHITMER